IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JAIPUR BENCH

S.B. CRIMINAL MISC. PETITION NO.572/06

Shambhudayal & Ors.

Versus

State & Anr.

DATE OF ORDER :: 24/10/2007

HON'BLE MR. JUSTICE AJAY RASTOGI

Mr. Bharat Saini, for petitioners
Mr. Arun Sharma, Public Prosecutor for State
Mr. Babu Lal Saini, for complainant

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Instant petition has been filed assailing the order dt.2nd April, 2005 whereby learned Sub-Divisional Officer, Udaipurvati, Jhunjhunu in exercise of his power u/s.133 Cr.P.C. directed the petitioners to remove obstruction over the disputed land situated in Khasra No.612 and recorded finding that alleged obstruction put by petitioners is causing public nuisance. Against the said order, present petitioners preferred revision petition which too was dismissed by a detailed order on 7th February, 2006 while affirming finding/observation made by Executive Magistrate. It has been further observed that so far as pendency of civil suit is concerned, what has been observed under order impugned will certainly abide by final orders passed in civil suit pending between the parties.

Undisputedly, non-petitioner No.2, who is a defence personnel, is not party to the civil suit which is pending before the competent court of jurisdiction. Non-petitioner-complainant filed a complaint u/s.133 Cr.P.C. before the Executive Magistrate, Jhunjhunu in which it was alleged that while he was serving at the Border for the nation, his family resides in Khasra No.612 measuring .08 hectares in Village Kishorpura since his ancestors and there are other residents reside therein which exists on the western side of Village Bhaishal Johari and the public way has been obstructed and blocked by petitioners by constructing pucca boundary wall and two shops on the way which is causing public nuisance and inconvenience to the public at large. On the said complaint, the Executive Magistrate sent it for inquiry and SDO obtained factual report and site report from concerned Patwari and Girdawar dated 31st July, 2004 & 2nd November, 2004 and in both the reports, which were submitted by different officers, these facts were established by them that certainly there is obstruction over the disputed land in Khasra No.612. Accordingly, notices were served upon petitioners and despite affording opportunity, petitioners failed to file reply and no evidence in support thereof was produced. Learned Executive Magistrate [SDO] after taking into consideration the material finally recorded finding that it was a case of

public nuisance falls within the ambit of Section 133 Cr.P.C. and taking note of the reports furnished by respective officers, finally directed the petitioners herein to remove the obstruction over the disputed land. Court of Revision has also considered the submission in detail and while affirming the finding taking note of objection raised by petitioners that civil suit is pending between the parties and order of status quo has been passed, it has been specifically observed that what has been observed by learned Executive Magistrate in his order while disposing of application/complaint will abide by final decision in pending civil suit.

Counsel for petitioners even in the instant petition raised same objection that it was not a case of public nuisance, as such a gross manifest error has been committed by learned Executive Magistrate in invoking power u/s.133 Cr.P.C. and since civil suit is pending and interim order has been passed, as such such powers u/s.133 Cr.P.C. available cannot be invoked and the orders have been passed without affording them a reasonable opportunity of hearing.

Both the two objections have been considered in detail and I have already observed above in detail and this court is of the opinion that it has been specifically meted out not by Executive Magistrate and by Court of Revision as well and

this court does not find infirmity in the said finding recorded after due appreciation of material on record and so far as the objection raised with regard to civil suit is concerned, as has been observed supra, the complainant-non-petitioner is not party to the suit and apart from it, what has been observed by learned Executive Magistrate in his order impugned dated 2nd April, 2005 will finally abide the outcome of civil suit which is pending between the parties.

Learned Executive Magistrate while passing order has recorded the fact that after service was duly effected upon petitioners, opportunity was afforded to file reply. Despite opportunity being afforded, no reply was filed, as such after giving reasonable opportunity of hearing, final order was passed by learned Executive Magistrate and this court does not find any infirmity in recording said finding with regard to opportunity if any not afforded to petitioner.

Consequently, this court does not find any substance in the misc. petition, the same stands dismissed.

[AJAY RASTOGI],J.